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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

FERNANDO JAY CARNERO,

Defendant and Appellant.

B294298

(Los Angeles County  
Super. Ct. No. VA148086)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Honorable Roger T. Ito, Judge. Affirmed.

Robert Somers, under appointment by the Court of Appeal,  
for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief  
Assistant Attorney General, Lance E. Winters, Assistant Attorney  
General, Noah P. Hill, and Stephanie C. Santoro, Deputy Attorneys  
General, for Plaintiff and Respondent.

A jury convicted appellant Fernando Jay Carnero of two counts of resisting an officer by force or violence, in violation of Penal Code section 69, subdivision (a).<sup>1</sup> The first count involved Carnero's struggle with one police officer, Officer Ana Quinones. The second count involved efforts by another officer on the scene, Officer Gustavo Herrera, to assist Officer Quinones during that struggle.

On appeal, Carnero argues the evidence does not support his second section 69 conviction. In order for Carnero's second section 69 conviction to stand, Carnero must have forcibly resisted *Officer Herrera*—not just Officer Quinones. The jury could reasonably infer from the evidence that, when Carnero chose to start the car and drive away, he knew doing so placed both Officer Herrera and Officer Quinones in immediate physical danger. Thus, the record is sufficient to establish that Carnero used the car to forcibly resist Officer Herrera in this way. We conclude this satisfies the requirements of the statute and supports Carnero's second section 69 conviction.

Carnero also challenges the \$300 minimum restitution fine under section 1202.4, subdivision (b) and \$140 in assessment fees the court imposed as part of Carnero's sentence. Carnero argues that assessing these amounts without first establishing Carnero's ability to pay them violates his constitutional rights under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). On this basis, he requests we remand with instructions that the trial court conduct a hearing to determine whether Carnero has the ability to pay the fees and fine imposed. To the extent Carnero has not forfeited his ability-to-pay arguments by failing to raise them below, we conclude that *Dueñas* is inapplicable on the current record.

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Penal Code.

We therefore affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### ***A. Incident Underlying Convictions***

At about 1:00 a.m. on June 27, 2018, Officer Maria Madrigal saw Carnero near a fire that was burning next to a car, and informed him he could not leave the scene until police had investigated the fire. Officer Quinones and Officer Herrera arrived to assist. At one point while the officers were preparing to conduct a pat-down search of Carnero, Carnero managed to run to the car and got into the driver's seat without closing the door. Officer Quinones ran after him and leaned the upper half of her body into the car and onto Carnero, struggling with him over the keys, ignition, and gearshift in an unsuccessful effort to prevent him from leaving.

During the struggle, Officer Herrera attempted to reach into the car to help Officer Quinones, but "there was not enough space for [Officer Herrera]." Officer Herrera next tried to assist Officer Quinones by sliding his baton through the "small gap between the door frame and Officer Quinones's body" and repeatedly pushing the butt of the baton into Carnero, in a motion similar to "using a pool cue." In the process, Officer Herrera jammed his thumb into the door frame and injured it. Carnero never grabbed Officer Herrera's baton, nor did Carnero touch any part of Officer Herrera's body.

Despite these efforts by Officer Quinones and Officer Herrera, Carnero ultimately was able to start the car and drive away, "dragging Officer Quinones along with the vehicle" "about ten feet" before she fell out of the car. The record is unclear as to exactly where Officer Herrera was when Carnero started the car, and

whether Officer Herrera was in contact with the vehicle at that time.<sup>2</sup> Carnero was found and apprehended later the same day.

### **B. *Conviction and Sentencing***

A jury found Carnero guilty of two counts of resisting an officer by force and violence—one involving Officer Quinones, and one involving Officer Herrera—in violation of section 69, subdivision (a).<sup>3</sup>

The court sentenced Carnero to 32 months in county jail, a sentence comprised of two years for the count involving Officer Quinones and eight months for the count involving Officer Herrera. These reflect the middle term sentence and one-third of the middle term sentence, respectively.

The court further ordered Carnero to pay (1) the statutory minimum restitution fine of \$300 under section 1202.4, subdivision (b); (2) a court operations assessment fee of \$40 per conviction under section 1465.8, subdivision (a)(1); and

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<sup>2</sup> Specifically, Officer Herrera testified that he could not get any part of his body into the car, that at some point after poking Carnero with the baton and jamming his thumb against the door, he “yelled” to Officer Quinones to warn her when he “heard” the car engine starting, that he observed Officer Quinones get dragged by the car, and that he himself was not dragged by the car.

<sup>3</sup> Carnero was initially charged with six counts: assault on an officer with a deadly weapon or likely to cause great bodily injury (§ 245, subd. (a), count 1); resisting arrest (§ 148, subd. (a)(1), count 2); two counts of battery with injury on an officer (§ 243, subd. (c)(2), counts 3 and 4); and the two counts of resisting an officer by force and violence noted above (§ 69, subd. (a), counts 5 and 6). Carnero pleaded not guilty to all counts. After the close of evidence, the prosecution dismissed counts 2, 3, and 4. The jury deadlocked on count 1, and the court declared a mistrial as to that count.

(3) a conviction assessment fee of \$30 per conviction under Government Code section 70373, subdivision (a)(1). The court also ordered but stayed a parole revocation restitution fine of \$300 under section 1202.45.

Carnero did not object to the imposition of any fees or fines, nor did he raise the issue of his ability to pay before the trial court. The record contains little information bearing on Carnero's financial situation. Carnero could not afford private counsel at trial. The probation report indicates he was unemployed at the time of the arrest, and includes an "unverified" entry indicating previous work as an engineer, "quality inspector, recycler, sales." (Capitalization omitted.) The report further indicates that "defendant's financial status is unknown due to not being interviewed for this report." (Capitalization omitted.)

Carnero timely filed a notice of appeal.

## DISCUSSION

### A. *Section 69 Conviction Involving Officer Herrera*

The parties do not dispute what happened during the incident. Carnero's argument regarding his second section 69 conviction thus involves the purely legal question of whether the undisputed facts satisfy the elements of a section 69 violation, and our review is de novo. (*Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378, 1384; *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799 ["When the decisive facts are undisputed, we are confronted with a question of law and are not bound by the findings of the trial court."].)

Section 69 prohibits, in pertinent part, "knowingly resist[ing], by the use of force or violence, [a police] officer, in the performance of his or her duty." (§ 69, subd. (a).) Carnero argues that the evidence is insufficient to support his section 69 violation as to

Officer Herrera, because Carnero did not touch Officer Herrera or direct any force or violence towards Officer Herrera specifically. But whether Carnero directed force at Officer Herrera is not the relevant inquiry. A “violation of section 69 need not involve any force or violence *directed* toward the person of [the] officer. Rather, . . . force used by a defendant in resisting an officer’s attempt to restrain and arrest the defendant is sufficient to support a conviction.” (*People v. Bernal* (2013) 222 Cal.App.4th 512, 519, italics added; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 985–986.) Employing force or violence to resist an officer can be, but is not necessarily, the same thing as directing force or violence at an officer. In *Bernal*, for example, the court concluded a defendant forcibly resisted an officer when, while the officer was holding on to the defendant’s waist, the defendant ran and swung his hips from side to side in an attempt to free himself, causing both men to fall “violently to the ground.” (*Bernal, supra*, 222 Cal.App.4th at pp. 518, 520 [such “forceful resistance” “amply supported” a section 69 violation].) Similarly, in *Carrasco*, a defendant’s kicking, struggling, and “squirm[ing]” in a struggle with an officer to avoid arrest constituted resisting the officer by “force or violence.” (*Carrasco, supra*, 163 Cal.App.4th at pp. 985-986.) In both *Bernal* and *Carrasco*, the defendant was physically *resisting* the officer in question, but was not necessarily *directing force at* that officer.

Although a section 69 violation does not require force be directed at a particular officer, it does require a specific victim; it prohibits not all forcible resistance, but rather forcibly “resist[ing] . . . [an] officer.” (§ 69, subd. (a), italics added.) Courts have therefore concluded that a section 69 violation is a de facto “crime ‘against the person,’ ” even if any harm to the officer’s person

is “merely incidental to the goal of facilitating the perpetrator’s escape.” (*People v. Martin* (2005) 133 Cal.App.4th 776, 782–783.)<sup>4</sup>

“[A] charge of multiple counts of violating a statute is appropriate only where the actus reus prohibited by the statute,” also referred to as “the gravamen of the offense”—here, forcefully resisting an individual police officer—“has been committed more than once.” (*Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 349.) Therefore, to determine whether Carnero’s conduct reflects a second section 69 violation regarding Officer Herrera, we must determine whether Carnero resisted Officer Herrera—not just Officer Quinones—by force or violence. If Carnero forcibly resisted only Officer Quinones, he violated section 69 only once, and his second section 69 conviction involving Officer Herrera cannot stand.

The Attorney General argues that by “remaining in the car and driving away despite the officers’ physical efforts to stop him,” Carnero resisted both Officer Herrera and Officer Quinones by “force or violence.” We disagree that an *officer’s* physical efforts to apprehend a defendant can—without more—transform a defendant’s effort to flee into resistance *by force*.

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<sup>4</sup> For these same reasons, resistance by force or violence that violates section 69 necessarily also reflects an assault and battery—both crimes with specific victims. (See *People v. Brown* (2016) 245 Cal.App.4th 140, 152–153 (*Brown*) [assault is a lesser included offense of a section 69 violation by forceful resistance]; see also CALCRIM No. 2652 & CALJIC No. 16.141 [defining the words “force” and “violence” for the purposes of a section 69 violation as the terms apply to battery, namely “any [unlawful] application of physical force *against the person of another*,” whether or not intentional or harmful], italics added.)

Carnero's decision to start the car under the circumstances reflected in the record, however, warrants further scrutiny. A car can be an instrument of force. (See *People v. Wright* (2002) 100 Cal.App.4th 703, 705, 707–709 (*Wright*) [intentionally driving pickup truck close to persons with whom defendant had contentious relations constituted assault with a deadly weapon].) Indeed, a defendant may commit assault—a lesser included offense of a section 69 violation involving forceful resistance (see *Brown, supra*, 245 Cal.App.4th at pp. 152-153)—by driving in such a way that he knows will “probably and directly result in the application of physical force upon” the victim. (*Wright, supra*, 100 Cal.App.4th at pp. 706 & 725 [“any operation of a vehicle by a person knowing facts that would lead a reasonable person to realize a battery will probably and directly result may be charged as an assault with a deadly weapon”].) It follows that a defendant can forcibly resist an officer for the purposes of section 69 by driving away from that officer in a manner the defendant knows will “probably and directly result in the application of physical force upon” that officer. (*Wright, supra*, at p. 725.)

Here, the evidence supports a reasonable inference that, when Carnero began to drive the car, he was aware that Officer Herrera was at least close enough to the vehicle that injury to *both* Officer Herrera and Officer Quinones could “probably and directly” result from that decision. (*Wright, supra*, 100 Cal.App.4th at p. 725.) Specifically, even if Carnero did not visibly react to Officer Herrera's baton pokes, the jury could reasonably conclude that Carnero felt them. And, because Officer Quinones was struggling with Carnero to get the keys and take hold of the gearshift at the same time Officer Herrera was wielding his baton, the jury could also reasonably infer that Carnero knew someone *other than* Officer Quinones must be the source of the baton pokes—and thus that

another officer was close enough to the car to make indirect contact. In this way, the evidence supports that Carnero chose to drive away under circumstances he knew put both Officer Quinones and Officer Herrera in immediate physical danger. The evidence is therefore sufficient to support a finding that Carnero forcefully resisted each of those two officers, and to support Carnero's second section 69 conviction.

**B. *Ability to Pay Determination (Dueñas Argument)***

Carnero next argues that the trial court's imposition of a court operations assessment fee, conviction assessment fee, and minimum restitution fine was unconstitutional under *Dueñas*, *supra*, 30 Cal.App.5th 1157, because the court failed to make a presentencing determination that he had the ability to pay these amounts. We disagree.

**1. *Forfeiture***

The Attorney General argues that Carnero's failure to object to the fines and assessments or raise the issue of inability to pay below caused him to forfeit any such argument on appeal. Carnero counters that objecting below would have been futile because the fines and fees at issue are statutorily mandated and routinely imposed, and that *Dueñas* changed the law in a manner that was not reasonably foreseeable. Courts of Appeal are divided on the issue. (Compare *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 [finding no forfeiture, reasoning *Dueñas* announced a new "constitutional principle that could not reasonably have been anticipated at the time of trial"] and *People v. Johnson* (2019) 35 Cal.App.5th 134, 138 [declining to find forfeiture, reasoning that *Dueñas* was not "predictable [such that it] should have been anticipated" and that the restitution fine statute prohibits courts from staying minimum restitution fine based on inability to pay],

with *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154–1155 [finding forfeiture, reasoning that “*Dueñas* was foreseeable” and “applied law that was old, not new”] and *People v. Bipialaka* (2019) 34 Cal.App.5th 455 [same].)

We need not weigh in on this debate or determine whether Carnero forfeited his *Dueñas* argument, however, because *Dueñas* is inapplicable on the record before us, for the reasons we discuss below.

**2. *Trial court’s failure to assess whether Carnero could pay the fees and fine***

Assuming without concluding that *Dueñas* was correctly decided, it is inapplicable on the record before us, and thus does not require that Carnero be afforded an ability to pay hearing.

**a. *Dueñas* decision**

*Dueñas* concluded that the trial court erred when it imposed fees and a restitution fine on defendant *Dueñas*—a homeless, unemployed mother of three with cerebral palsy—despite the record reflecting her inability to pay those fines and fees. (*Dueñas, supra*, 30 Cal.App.5th at p. 1162.) *Dueñas* had been convicted of driving with a suspended license, and, as a condition of probation, the court imposed the fees and fine at issue when she could not obtain a valid driver’s license within the time ordered by the court. (*Id.* at pp. 1161–1162.) She had four previous misdemeanor convictions for driving without a valid license, in connection with which she had been assessed other fines and fees she likewise was unable to pay, “caus[ing] her financial obligations to ‘snowball.’” (*Id.* at pp. 1163–1164.) The record in *Dueñas* thus established *Dueñas*’s persistent state of poverty and inability to pay, barriers to employment and family circumstances that made continued poverty likely, and a cycle of convictions and unpaid fines associated with

her indigence. (*Id.* at p. 1163.) The trial court held an ability to pay hearing, but concluded that the fees and fine were mandatory, and that the uncontested evidence of Dueñas’s inability to pay did not permit the court to stay or waive them. (*Id.* at pp. 1162–1163.)

The Court of Appeal reversed. The bedrock of its holding was that imposing fines on defendants who lack the ability to pay them has “cascading” and “potentially devastating consequences”—some of which were “illustrate[d]” by the evidence before it regarding Dueñas’s situation—and that these consequences constitute “additional punishment for a criminal conviction for those unable to pay.” (*Dueñas, supra*, 30 Cal.App.5th at pp. 1163, 1168–1169.) Specifically, the court discussed both practical and legal consequences that defendants unable to pay face when fines are imposed, but that nonindigent, otherwise-similarly-situated defendants do not. First, “[c]riminal justice debt and associated collection practices can damage credit, interfere with a defendant’s commitments, such as child support obligations, restrict employment opportunities and otherwise impede reentry and rehabilitation.” (*Id.* at p. 1168.) Second, the court noted that an indigent probationer who is unable to pay a restitution fine is not statutorily entitled to have the charges against her automatically dismissed upon successful completion of all other terms of probation, and must instead request the court exercise its discretion to dismiss the charges in the interest of justice.<sup>5</sup> (*Dueñas, supra*, 30 Cal.App.5th at pp. 1170–1171.) By contrast, a probationer who has the ability to pay her restitution fine need not rely on the discretion of the court to receive such relief.

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<sup>5</sup> As the Court of Appeal in *Dueñas* acknowledged, however, “the Vehicle Code section Dueñas violated makes her ineligible for mandatory relief upon her completion of probation” in any event. (*Dueñas, supra*, 30 Cal.App.5th at p. 1172.)

(See § 1203.4, subd. (a)(1), *Duenas*, supra, 30 Cal.App.5th at pp. 1170-1171.) Thus, “the wealthy defendant is offered an ultimate outcome that the indigent one will never be able to obtain—the successful completion of all the terms of probation and the resultant absolute right to relief from the conviction, charges, penalties, and disabilities of the offense.” (*Id.* at p. 1171.)

*Dueñas* concludes that, because these consequences flow directly from a defendant’s inability to pay—as opposed to from any criminal misconduct—they violate the constitutional prohibition on punishment based solely on a criminal defendant’s poverty. (See *Dueñas*, supra, 30 Cal.App.5th at pp. 1166–1167, citing *In re Antazo* (1970) 3 Cal.3d 100, 108, 115 & *Bearden v. Georgia* (1983) 461 U.S. 660, 667–668.)

In sum, the record in *Dueñas* established that imposing fines and fees *Dueñas* could not pay would only perpetuate a pre-existing cycle of poverty and additional convictions associated with her indigence. On these facts, the Court of Appeal concluded that “unpayable” fines and fees constituted additional punishment based solely on poverty and thus rises to the level of a state and federal due process violation.

b. *Dueñas is inapplicable*

The instant case is distinguishable from *Dueñas*. The Court of Appeal noted that *Dueñas*’s situation stemmed “from a series of criminal proceedings driven by, and contributing to, *Dueñas*’s poverty,” rather than “‘from one case for which she’s not capable of paying the fines and fees.’” (*Dueñas*, supra, 30 Cal.App.5th at p. 1164.) Not so here. Unlike in *Dueñas*, *Carnero*’s conviction for resisting an officer by force or violence is not the result of (or even related to) indigence or failure to pay, nor is there any indication that imposing the fees and fine at issue will continue

a “counterproductive” “cycle” of poverty in Carnero’s life. (*Id.* at p. 1163.) As punishment for driving without a license that Dueñas could not afford to obtain, the court ordered her to pay fines and fees she could not afford to pay. Here, by contrast, the fees and fine were part of Carnero’s sentence for conduct wholly unrelated to Carnero’s financial situation: namely, endangering the life of a police officer by forcibly resisting arrest. Nothing suggests that ordering Carnero to pay the challenged fees or fine will perpetuate a cycle of poverty like that at play in *Dueñas*. Nor is there any basis for concluding such financial obligations—whether or not Carnero has the present ability to satisfy them—will make it more likely Carnero will again use physical force to resist law enforcement efforts or commit any other crime. (See *id.* at p. 1168 [discussing “recidivism” as an indirect effect of imposing fines a defendant cannot pay].)

Nothing like the unique set of facts that the *Dueñas* court determined reflected a constitutional violation is present here. We leave for another day the question of what circumstances other than those present in *Dueñas* might reflect a constitutional violation and require an ability-to-pay determination. The circumstances reflected in the record before us do not.

**DISPOSITION**

The judgment is affirmed.  
NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

BENDIX, J.